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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 3(n) and 332 of the Communications Act	)	GN Docket No. 93-252
	)	
Regulatory Treatment of Mobile Services	)	

To: The Commission

REPLY COMMENTS OF PAGEMART, INC.

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SUMMARY

Through its recent amendments to the Communications Act, Congress has granted the Commission broad discretion to determine the regulatory classification of mobile service providers. In these reply comments, PageMart urges the Commission to utilize its discretion to establish a rational and equitable regulatory framework, and to reject arguments that it must sweep all mobile services into one "commercial mobile services" category. Such arguments ignore the intent of Congress in delegating authority for these regulatory decisions to the Commission, and would result in unnecessary over-regulation of many services, including paging.

PageMart believes that the most appropriate regulatory classification for traditional paging services is that of a private mobile service. Assuming arguendo that the Commission determines that paging must be regulated as a commercial mobile service, paging operators should be subjected to the minimum permissible level of federal and state regulation.

Finally, PageMart urges the Commission to reaffirm its view that all mobile service providers, including both private and commercial providers, are entitled to full intrastate and interstate interconnection rights.

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PageMart, Inc. ("PageMart"), by its attorneys, hereby replies to the comments filed by various parties in response to the above-captioned Notice of Proposed Rulemaking, FCC 93-454, released October 8, 1993 ("NPRM").

I. THE CLAIM THAT ANY INTERCONNECTION WITH THE PUBLIC SWITCHED NETWORK REQUIRES TREATMENT AS A COMMERCIAL MOBILE SERVICE IGNORES THE CLEAR INTENT OF CONGRESS.

By amending Section 332 of the Communications Act of 1934 ("the Act"),[1/] Congress sought to eliminate some of the disparities in the various regulatory structures under which competing mobile services must operate. Congress was particularly concerned that the very different regulatory schemes imposed on cellular and ESMR operators -- despite the fact that they provide an essentially indistinguishable

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1/ 47 U.S.C. § 332.

service -- were unfairly skewing the competitive balance.[2/] Congress further was concerned that future personal communications services ("PCS") service providers be subjected to a rational regulatory scheme.[3/]

However, Congress also recognized that the extraordinary diversity among existing and proposed for-profit mobile services weighed heavily against the adoption of uniform, across-the-board regulation. Thus, the Commission specifically was directed to use its agency expertise to determine which services should fall into which regulatory categories, based upon, inter alia, the extent to which a particular mobile service provides its subscribers with access to the public switched network ("PSN").[4/]

A number of commenters have urged that, in response to this Congressional directive, the Commission should simply lump essentially all PSN-interconnected for-profit services into the Section 332(d)(1) commercial mobile service ("CMS") category. In general, these commenters claim that any mobile service offering end users access -- direct or indirect -- to the PSN should be classified as a CMS, regardless of the purpose of that interconnection or

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2/ See H.R. Rep. No. 103-213, 103rd Cong., 1st Sess. (1993) ("Conference Report"), at 490-491. See also, Comments of the American Mobile Telecommunications Association ("AMTA") at 8; Comments of the Utilities Telecommunications Council ("UTC") at 3.

3/ See Conference Report at 491-92.

4/ See id. at 495-96.

the extent of a subscriber's ability to access and employ the PSN via the mobile network.[5/]

If the Congress had intended the Commission to regulate as common carriers all for-profit mobile service providers whose networks are interconnected with the PSN, it need only have said so. It did not. Instead, Congress directed the Commission to utilize its regulatory expertise to determine how the broad array of existing mobile services that do interconnect in some way with the PSN should be classified -- with those that not only are interconnected with the PSN, but that also make interconnected service available to their subscribers, being categorized as CMS providers.[6/] As PacTel Corporation put it: "[v]irtually all mobile service systems access the network at some point, but the determinant of interconnectedness for these purposes should be whether the service's subscribers can access the public switched telephone network in the traditional sense."[7/]

5/ See, e.g., Rochester Telephone Corporation Comments at 4; Nextel Communications, Inc. ("Nextel") Comments at 16; Southwestern Bell Corporation ("Southwestern Bell") Comments at 6-7; PacTel Paging Comments at 4-6; Arch Communications Group, Inc. Comments at 4; Pacific Bell Corporation ("Pacific Bell") Comments at 6; Paging Network, Inc. ("PageNet") Comments at 5.

6/ See 47 U.S.C. § 332(d), 107 Stat. 395-96.

7/ PacTel Corporation ("PacTel") Comments at 9. To quote also from Comcast Corporation's Comments, at 4, "real world distinctions between services and service . . . providers . . . should not be lightly dismissed in order to satisfy the interests of larger and better financed incumbents." See also Ram Mobile Data Comments at 3-5.

Perhaps the best proof of Congress' intent that the Commission approach the interconnection issue in a serious, analytical manner is the vacuity of various commenters' citations to instances in which, in some unrelated context, the Commission once described a particular technology or service as "interconnected." For example, it strains credulity to suggest that Congress intended that the test for PSN-interconnection under Section 332 be the same as that employed in enforcing Article XIV(d) of the Intelsat treaty,[8/] yet many commenters nevertheless assert that view.[9/] The Commission's discussion of what qualified as a PSN-interconnected service in the Separate Systems[10/] decision bears no relationship to Congress' goal in amending Section 332.[11/]

Even had Congress not been so clear in its intent that the Commission establish a standard that takes into account the vast differences between services that have some

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8/ INTELSAT Intergovernmental Agreement, August 20, 1971, 23 U.S.T. 3813, 3853, TIAS No. 7532.

9/ See, e.g., Mobile Telecommunications Technologies Corporation ("Mtel") Comments at 6-7; PageNet Comments at 7; Public Service Commission of the District of Columbia ("DCPSC") Comments at 5.

10/ See Establishment of Satellite Systems Providing International Communications, 101 F.C.C.2d 1046 (1985), on reconsideration, 61 R.R. 2d 649 (1986), further reconsidered, 1 F.C.C. Rcd. 439 (1986).

11/ See PageMart Comments at 6.

interconnection with the PSN, the most elemental policy considerations weigh heavily against the extremist view that any interconnection is enough to warrant common carrier treatment. In an industry where technology and products are rapidly evolving, the risks of overregulation resulting from a rigid, simplistic definition of interconnection are enormous.

For example, as the Commission notes,[12/] there are likely to be numerous new PCS services that will not necessarily be rationally or appropriately regulated as common carriers. By adopting an inflexible, all-encompassing definition now, the Commission condemns those new technologies to a regulatory classification that may be totally inappropriate. There is not a scintilla of evidence in the record, nor any rational policy reason, for the Commission to embrace such a result. Instead, the Commission must examine the true circumstances of each mobile service in order to ascertain whether the level of interconnection at issue is the sort that was of concern to Congress.[13/]

12/ NPRM at ¶ 45.

13/ Some commenters argue this would create severe administrative difficulties. See, e.g., Comments of the People of the State of California and the Public Utilities Commission of the State of California ("CAPUC") at 2-3; Comments of the DCPSC at 9. It may well be true that it would be easier for the Commission simply to lump all current and future services that interconnect with the PSN into the CMS category. That,

(continued...)

II. A DEFINITION OF "INTERCONNECTED SERVICE" THAT IS CONSISTENT WITH CONGRESS' INTENT WILL RESULT IN THE REGULATION OF PAGING AS A PRIVATE MOBILE SERVICE.

As the Commission outlined in the NPRM, and as PageMart demonstrated in its initial Comments,[14] services that truly are interconnected in the sense meant by Congress "must provide subscribers to mobile radio service with the ability to directly control access to the public switched network for purposes of sending or receiving" communications.[15] Thus, if the customers of a given system do not have access to the interconnected portion of the system, it should not fall into the CMS category.[16]

Under this definition of "interconnected service," paging services, including those currently provided on a common carriage basis, would be classified as private mobile

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[13] (...continued)
however, should be irrelevant to the Commission's analysis. Had Congress intended the Commission's administrative ease to be the deciding factor -- rather than the rationality of the regulatory scheme -- it would have said so.

[14] See PageMart Comments at 7-8.

[15] NPRM at ¶ 16.

[16] See UTC Comments at 8-9; Rockwell International Corporation ("Rockwell") Comments at 3, arguing that the "key determinant" in determining whether a service should be considered "interconnected" is "whether the customer's entire message is stored at the hub before it is forwarded, or whether the customer has access to the public network at the individual packet level via a . . . 'physical' circuit offered through the hub."

services ("PMS").[17] As PageMart noted in its Comments, a paging company uses the PSN solely to gather requests for the activation of its network. There is no "real-time" link through the PSN between the sender and the receiver of the paging message. Instead, the interconnection simply provides an interface through which the end users can contact the network but not use the network itself.[18]

A few commenters try to argue that the statutory "grandfathering" of private paging services for three years after enactment of the Budget Act provides explicit evidence that Congress intended to regulate paging services as CMS.[19] In fact, this provision does not refer exclusively to private paging, but includes within its scope all private land mobile services.[20] As is clear from the legislative history, the specific language on paging services was included not to indicate that all paging services were to be subjected to common carrier regulation. Rather, it was

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17/ McCaw Cellular Communications, Inc. ("McCaw Cellular") argues that all paging services should be regulated as CMS, since private carrier paging services are identical to common carrier paging services. See McCaw Cellular Comments at 28-29. That analysis, however, has nothing whatsoever to do with the criteria established by Congress for making those regulatory choices.

18/ PageMart Comments at 7-8.

19/ See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(c), 107 Stat. 393 (1993) ("Budget Act"); Comments of PageNet at 12-14; U.S. West Comments at 6; Mtel Comments at 11, n.14.

20/ Budget Act § 6002(c).

included to prevent existing paging services from being subjected to state entry regulation in jurisdictions where such services had not been previously offered, pending implementation of the statutory preemption provisions.[21/]

III. THE "FUNCTIONAL EQUIVALENCE" EXEMPTION WAS CLEARLY INTENDED TO BROADEN THE RANGE OF MOBILE SERVICES THAT COULD BE CLASSIFIED AS PRIVATE MOBILE SERVICES.

Many of the commenters who erroneously argue that the Commission must adopt a simplistic definition of "interconnected service" have also misconstrued Congressional intent with regard to the "functional equivalence" exemption set out in Section 332(d)(3).[22/] As PageMart demonstrated in its Comments, at 8-10, the only example of the operation of the "functional equivalence" test provided by the legislative history makes clear that Congress intended the Commission to classify as a PMS those services that, while they may fall within the literal definition of a CMS, do not offer a service that is the

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21/ See Conference Report at 498. Similarly, neither the statute nor its legislative history support the related argument that, by declining to grandfather private carrier paging companies from the application of the foreign ownership restrictions, Congress intended that such companies fall into the CMS category. In fact, the statute does not exempt any current private land mobile service from the foreign ownership restrictions, leaving it to the Commission's discretion to determine which of those services should be placed in the CMS category and, thus, be subject to this element of common carriage regulation.

22/ See, e.g., U.S. West Comments at 7-9; Southwestern Bell Comments at 12-14; Bell Atlantic Comments at 13-14.

functional equivalent of a CMS.[23] As Geotek Industries, Inc. notes, if Congress meant for the functional equivalence test to be construed otherwise, "then the example provided in the Conference Report would have no meaning."[24]

PageMart urges the Commission to rely on the plain meaning of the language in the Conference Report, which can lead to only one conclusion: the Congress intended the functional equivalency test to provide an additional means through which certain services can avoid inappropriate common carrier regulation.

IV. IF THE COMMISSION MUST REGULATE PAGING SERVICES AS COMMERCIAL MOBILE SERVICES, IT SHOULD USE ITS DISCRETION TO FORBEAR FROM THE IMPOSITION OF ALL BUT THE MANDATORY TITLE II PROVISIONS.

The vast majority of commenters have urged the Commission to utilize its discretion to forbear from imposing all but the mandatory provisions of Title II of the Act on most CMS providers.[25] As several commenters noted, Title II regulations were designed to protect

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[23] See Conference Report at 496.

[24] Comments of Geotek Industries, Inc., at 6-7. See also Comments of UTC at 14, noting that "Congress added an 'escape valve' for classifying services as private even if they meet the literal definition of commercial mobile service"; Comments of Motorola at 10, noting that "the functional equivalence test should be flexible enough to permit the consideration of numerous factors."

[25] Virtually the only commenters who oppose regulatory forbearance are state regulatory bodies. See, e.g., New York Department of Public Service ("NYDPS") Comments at 10-11; CAPUC Comments at 6-8.

consumers from the unfair market practices of monopolies, where the market could not discipline itself through competition.[26/]

Several commenters argue in favor of disparate regulation of CMS providers, depending on the nature of the service being provided. For example, some favor heavier regulation of cellular services.[27/] Others favor differing levels of regulation based on bandwidth[28/] or the "dominant" nature of the provider.[29/]

In general, PageMart supports uniform regulation for all mobile service providers within a particular market segment (e.g., cellular), with perhaps an exception for truly "dominant" carriers. More specifically, as PageMart demonstrated in its initial Comments, at 13-15, the fiercely competitive paging industry should be subjected to the absolute minimum of both federal and state regulation permitted under Title II, assuming arguendo that the Commission determines that paging falls into the CMS category.

26/ See, e.g., Century CelluNet Comments at 5-6.

27/ See, e.g., Nextel Comments at 22-23.

28/ See, e.g., PacTel Paging Comments at 7-8.

29/ See, e.g., National Association of Business and Educational Radio, Inc. ("NABER") Comments at 15-16; Nextel Comments at 24.

V. THE COMMISSION MUST GRANT PAGING CARRIERS AND ALL OTHER MOBILE SERVICE PROVIDERS EXPLICIT INTERCONNECTION RIGHTS.

Completely separate from the question of whether paging should be placed in the CMS category is the issue of the right of interconnection of paging carriers. Congress viewed this right to be vital, "since interconnection serves to enhance competition and advance a seamless national network."[30/]

Most commenters recognize the need for all mobile services to have clear interconnection rights. Indeed, only U.S. West proposes that the interconnection rights of PMS providers should be less than those of CMS providers, arguing that Congress' failure to include PMS within the context of Section 332(c)(1)(B) must have meant that Congress intended for there to be a distinction.[31/] A few other commenters suggest that the Commission should address the interconnection rights of PMS providers on a case-by-case basis, i.e., through the complaint process.[32/]

30/ See H.R. Rep. 103-111, 103rd Cong., 1st Sess. (1993), at 261.

31/ See U.S. West Comments at 32-33

32/ See id.; GTE Comments at 21-22, arguing that "purely private mobile service providers already have the right to request and obtain interconnection with the public switched network to meet their needs," and that affording private carriers interconnection rights "is not practicable or appropriate given the large number of such systems."

The Commission should reject these arguments. As was noted in the NPRM, at ¶ 72, there is no doubt that the Commission has the authority to require common carriers to provide interconnection to PMS providers as part of its jurisdiction to regulate interstate services.[33/] The Budget Act does not circumscribe this authority, nor does it indicate in any way that existing case law extending interconnection rights to private carriers is no longer valid.

Indeed, as PageMart demonstrated in its initial Comments, at 11, just the opposite is true. There is no language in the Communications Act that allows local exchange carriers to discriminate among private and common carrier paging companies for purposes of interconnection rights.[34/] As PageNet notes in its Comments, at 25, subsection 332(c)(1)(B) explicitly requires the FCC to "order common carriers to establish physical connections with such service pursuant to the provisions of Section 201 of the Act."[35/] At no point does the Congress limit this authority to exclude PMS providers. The Commission has jurisdiction to order carriers to interconnect with any

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33/ NPRM at ¶ 72. See also Telephone Data Systems, Inc. ("TDS") Comments at 15.

34/ See Joint Comments of CelPage, Inc., Network USA, Denton Enterprises, Copeland Communications & Electronics and Nationwide Paging at 4-5.

35/ 47 U.S.C. § 332(c)(1)(B).

mobile service operator, regardless of their status as either commercial or private providers.[36/]

PageMart urges the Commission to eliminate any potential uncertainty over interconnection rights by adopting a policy that ensures cost-based interstate and intrastate interconnection on fair terms for all mobile service providers.

CONCLUSION

The Budget Act, in amending the Communications Act, grants the Commission broad discretion to determine the proper regulatory classification of mobile services providers. The intent of these amendments to the Communications Act was to eliminate some of the disparities in the regulation of similar, competing mobile services. The Congress did not, however, intend for all for-profit mobile services to receive identical regulatory treatment. Instead, the statute delegates decisions on the regulation of individual services to the Commission, while at the same time providing the Commission with substantial guidance as to where those regulatory lines ought to be drawn.

The Commission should utilize this discretion and its expertise to determine the appropriate classification of varied mobile services. Arguments that the Commission should place virtually all mobile services into the CMS category should be rejected as expressly contrary to the

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36/ PageNet Comments at 26.

intent of Congress, and potentially devastating to the development of new services and industries.

In deciding on any regulatory framework, the Commission should take into account the fiercely competitive nature of paging services, and, in the event common carrier regulation is applied to these services, the Commission should forbear from applying all but the mandatory regulatory provisions. In addition, the Commission should reaffirm that paging carriers have full interstate and intrastate interconnection rights, regardless of their status as either commercial or private providers.

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Certificate of Service

I, Ginger S. Pribble, do hereby certify that copies of the foregoing Reply Comments of PageMart, Inc. were served via first-class, postage prepaid mail, on this 23rd day of November, 1993, to the parties listed below:

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